Supreme Court, U.S.
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NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

KAREN R. LUNDE,

PETITIONER

vs.

CHARLES M. HELMS, ET AL.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS, IN REVIEWING THE DECISION OF THE DISTRICT COURT JUDGE WITH RESPECT TO RECUSAL, USE THE WRONG STANDARD?

2. DID THE COURT OF APPEALS ERR IN TOTALLY IGNORING PETITIONER'S SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A JURY TRIAL IN SUSTAINING THE DISTRICT COURT'S SUMMARY JUDGMENT GROUNDED ON RES JUDICATA?

LIST OF PARTIES TO THE PROCEEDING

Karen R. Lunde, Petitioner.

Respondents:

Charles M. Helms, Associate Dean for Student Affairs and Curriculum, College of Medicine, University of Iowa;

John W. Eckstein, Dean of the College of Medicine, University of Iowa;

College of Medicine, University of Iowa;

Hunter R. Rawlings, III, President, University of Iowa;

Jerald W. Dallam, Registrar, University of Iowa;

The University of Iowa, State of Iowa.

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REFERENCES TO REPORTS OF THE OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The opinion of the United States Court of Appeals for the Eighth Circuit, of which review is sought here, pages A-2 through A-19 herein, has been published in the Federal Reporter, as Lunde v. Helms, 29 F.3d 367 (8th Cir. 1994).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Date of the entry of the judgment sought to be reviewed: July 6, 1994.

(ii) Date of any order respecting a rehearing: Order denying rehearing, August 15, 1994; see page A-20 herein.

(iii) There has been no cross-petition for a writ of certiorari.

(iv) Statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari: 28 U. S. Code Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATUTORY PROVISIONS INVOLVED

Title 28, U. S. Code, Sec. 455: Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served

during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform him-

self about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or

equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietory interest of a policyholder in a mutual

insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification

arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected

by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Chapter 17A, Code of Iowa, Administrative Procedure Act.

17A.1 Citation and statement of purpose.

* * * 2. This chapter is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public. . . .

17A.2 Definitions.

* * * 2. "Contested case" means a pro-

ceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.

17A.10 Informal settlements -- waiver.

1. Unless precluded by statute, informal settlements of controversies that may culminate in contested case proceedings according to the provisions of this chapter are encouraged. Agencies shall prescribe by rule specific procedures for attempting such informal settlements prior to the commencement of contested case proceedings. This subsection shall not be construed to require either party to such a controversy to utilize the informal procedures or to settle the contro-

versy pursuant to those informal procedures.

17A.11 Presiding officer -- administrative hearing officers.

1. The presiding officer in evidentiary hearings required to be conducted by an agency according to the provisions of this chapter governing contested cases shall be the agency, one or more members of a multimember agency, or an administrative hearing officer appointed according to the terms of this section. . . .

17A.12 Contested cases -- notice --hearing -- records.

* * * 4. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved and to be represented by counsel . . .

17A.19 Judicial review.

* * * 7. In proceedings for judicial review of agency action a court may hear and consider such evidence as it deems appropriate. In proceedings for judicial review of agency action in a contested case, however, a court should not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by Constitution or statute to the agency in that contested case proceeding. Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. . . .

17A.23 Construction.

Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute now in existence or hereafter enacted. . . .

STATEMENT OF THE CASE

On February 15, 1989, Karen R. Lunde filed her Complaint in the U. S. District Court for the Southern District of Iowa; the case was assigned to the Hon. Charles R. Wolle, District Judge.

Pursuant to Supreme Court Rule 14.1 (i), the basis for Federal jurisdiction set forth in the Complaint was: First Amendment, U. S. Constitution; Fourteenth Amendment, Sec. 1, U. S. Constitution; Title 20, U.S. Code, Secs. 1681 and 1687 (Title IX of the Education Amendments of 1972, as further amended); and Title 42, U. S. Code, Sec. 1983 (Civil Rights Act of 1871, as amended). The Complaint did not include any pendent state claims.

Relief sought in the Complaint was injunctive and declarative; no jury was requested. However, when six months

passed, with no relief granted by Judge Wolle, who was obviously biased in favor of Respondents, and with no Answer filed by Respondents, Petitioner amended her Complaint to request damages relief, and to request a jury trial on damages as to the four individual Respondents, pursuant to the Seventh Amendment, U. S. Constitution. This Complaint (Amended) was filed August 15, 1989.

On August 31, 1989, Judge Wolle entered an Order which, among other things, sua sponte, placed Petitioner's Federal case on a stay, of indefinite duration. Petitioner appealed portions of this Order to the U. S. Court of Appeals for the Eighth Circuit. In a per curiam opinion filed March 23, 1990, the Court of Appeals said it lacked appellate jurisdiction over the stay

order; treating Petitioner's appeal as a request for mandamus, the Court of Appeals held that the district court did not clearly abuse its discretion in staying the federal case pending resolution of the on-going state proceedings. [Emphasis supplied.] Lunde v. Helms, 898 F.2d 1343 (8th Cir., 1990); cert. denied, 498 U.S. 897, 111 S.Ct. 249 (1990).

The on-going state proceedings to which the Court of Appeals made reference were proceedings pursuant to Chapter 17A, Code of Iowa, the Iowa Administrative Procedure Act. These proceedings, which commenced February 16, 1989 immediately following Judge Wolle's denial of Petitioner's request for a temporary restraining order, had as their

purpose the dismissal of Petitioner Karen R. Lunde from the University of Iowa College of Medicine, purportedly for academic reasons, but actually because Petitioner's behavior did not conform to what some faculty members apparently believed to be appropriate for a female medical student and eventually, a female physician. These faculty members expressed their views in written evaluations of Petitioner which were reflected in the grades she received from them, violating Petitioner's Federal statutory rights to be free of sexual discrimination. See, Title 20, U. S. Code, Sec. 1681(a): "No person in the United States shall, on the basis of sex, be excluded from participation in,

be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."

Early on, Petitioner attempted to invoke new U. S. Supreme Court decisions in the developing area of the Civil Rights laws of the United States; these decisions supposedly made it easier for Petitioner to prove her case, as in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268, decided May 1, 1989, and supposedly made it clear that Petitioner could seek a damages remedy, as in Franklin v. Gwinnett County Public Schools, ____U.S.____, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). In fact, however, these decisions were simply ig-

nored or explained away by officials employed by the University of Iowa.

In participating in the State administrative proceedings to the extent she did, Petitioner relied on a U. S. Supreme Court decision, England v. Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed.2d 440 (1964), and, following entry of the District Court's stay order on August 31, 1989, Petitioner repeatedly gave notice to Respondents, and the Courts, of her election to litigate her Federal claims in the Federal forum. In all cases, the text of Petitioner's notice, repeated many times, was substantially as follows:

> Plaintiff has a right to a choice of forum and the fact that Plaintiff is not submitting certain of her claims,

such as her 42 U. S. Code Sec. 1983 claim, to any state forum; she is reserving that claim, and possibly certain others, for litigation in the Federal courts.

Petitioner was also relying on a provision in governing State law, Sec. 17A.23, Iowa Code (ante, page 15):

> Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be **in addition** to those created or imposed by every other statute now in existence or hereafter enacted. . . .[Emphasis supplied.]

Since it appeared that nothing that would take place in the State administrative

proceedings would preclude Petitioner from eventually pursuing her suit in Federal court, because of Sec. 17A.23, Iowa Code, as quoted above, Petitioner felt safe in participating in the State administrative proceedings to the extent necessary. Furthermore, Judge Wolle said, in his order of August 31, 1989, in pertinent part:

> The stay will be in effect until the final disposition of proceedings before the Iowa Board of Regents, and any subsequent proceedings authorized by Iowa statutes, including judicial review proceedings in the Iowa courts. [Citation omitted.]
>
> This court will lift this stay and hold further proceed-

> ings in this action if, on application and notice to defendants, the plaintiff demonstrates that any administrative and judicial proceedings plainly infringe the constitional rights or federal statutory rights of the plaintiff in respects that the State judiciary cannot or will not address and remedy. . . .

This was a far cry from the U. S. Supreme Court's decision in Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), to the effect that exhaustion of State administrative remedies "should not be required as a prerequisite to bringing an action pursuant to [42 U.S. Code] Sec. 1983."

Petitioner moved Judge Wolle to lift the stay, which lasted **three and one-half years**, on at least two separate occasions. The denial of one of these motions was appealed to the U. S. Court of Appeals for the Eighth Circuit; the appeal was accompanied by a motion for recusal. On September 17, 1991, the Court of Appeals ordered the appeal dismissed "for lack of jurisdication" and denied the motion for recusal as "moot." A petition for rehearing was denied Nov. 4, 1991. Thus, it was clear to Petitioner that the Court of Appeals would do nothing about Judge Wolle's stay order, and even denied its jurisdiction to consider it.

Petitioner had no choice, then, but to go forward with the State administrative proceedings. She did so under pro-

test, and when they were completed, she appealed the adverse decision, which was a foregone conclusion considering that these proceedings were conducted entirely by University of Iowa officials and others with University of Iowa loyalties. Petitioner totally exhausted her state remedies. See, Lunde v. Iowa Board of Regents, 487 N.W.2d 357 (Iowa App. 1992), cert. denied, ____U.S.____, 113 S. Ct. 377 (1992).

With the conclusion of the State administrative proceedings, Petitioner then sought to return, at last, to Federal Court, where she reasonably expected to try her damages claim before a jury, pursuant to her 1989 request for a jury, and pursuant to the Seventh Amendment, U. S. Constitution, (ante, page 3) which guaranteed

her a jury trial where "the value in controversy" exceeds twenty dollars; Petitioner had alleged damages of twenty **million** dollars (five million dollars actual damages, fifteen million dollars punitive damages). See, Complaint (Amended), Div. II, filed August 15, 1989.

On December 18, 1992, Petitioner filed a Motion to dissolve the stay, informing the District Court that the State administrative and judicial proceedings "have now been concluded." On that same date, Petitioner filed a Motion pursuant to 28 U. S. Code Sections 455(a) and 455(b)(1) requesting that Judge Wolle "disqualify himself from any further proceedings regarding the instant case." The recusal motion was supported by Petitioner's Affidavit.

On January 7, 1993, Judge Wolle filed an Order in which he granted the Motion to lift the stay, but in which he denied Petitioner's recusal motion. Judge Wolle wrote, in pertinent part:

> I did graduate from the University of Iowa College of Law in 1961. Since then I have made financial contributions to the Iowa Law School Foundation, a foundation that provides assistance to the University; I have three sons who have received graduate degrees from the University of Iowa; and I have presented educational programs at the University on two occasions. None of my children are now students

at the University of Iowa.

I have searched my mind and conscience. I firmly believe I can and will be fair and impartial in this case in which individuals associated with the University of Iowa are parties. I am not biased or prejudiced against the plaintiff Karen R. Lunde, or unfairly biased in favor of any of the defendants.

The duty of a federal judge to recuse is governed by 28 United States Code section 455(a) . . . The statute employs an objective reasonableness standard. [Citation omitted.] I conclude that under all circum-

> stances, both public and private, a reasonably involved person would not reasonably question my impartiality in this case. [Citation omitted.]

Having denied Petitioner's recusal motion, Judge Wolle then ordered a series of pre-trial deadlines, with trial to begin at 9:30 a.m. on Monday, July 12, 1993. Petitioner was subsequently authorized by a Judicial Magistrate to again amend her Complaint, reflecting changes that had occurred during the period of three and one-half years that Judge Wolle's stay order had been in effect.

Following several additional hearings, and after Petitioner had submitted copies of all her exhibits, and proposed jury instructions, to Judge Wolle, in

compliance with his various orders, Judge Wolle then, on July 2, 1993, ten days prior to the date the trial was to begin, entered "Rulings and Summary Judgment for Defendants." Judge Wolle wrote, in pertinent part:

> For the reasons that follow, this court concludes principles of res judicata bar plaintiff's attempt to obtain relief in this court. She is not entitled to a jury trial or a bench trial.

In his ruling, Judge Wolle characterized Petitioner's First Amendment claims as "frivolous." He further stated that "Plaintiff's First Amendment claim is barred by res judicata and also is spurious." Judge Wolle also ruled that " . . . plaintiff has cited no authorities for her theory that her Title IX

sexual discrimination claim is triable to a jury rather than to the court in a bench trial." Judge Wolle further wrote that "Plaintiff has had full and fair hearings and a complete evidentiary proceeding addressing all complaints about her dismissal from the Iowa University College of Medicine. She is entitled to no further trial on her damage claims." Judge Wolle directed the clerk of court to enter summary judgment in favor of defendants and against plaintiff, dismissing her claims and assessing costs to plaintiff.

Petitioner immediately filed a "Petition for a Writ of Mandamus Based on Denial of Seventh Amendment Jury Trial Right" with the U. S. Court of Appeals for the Eighth Circuit. The Court of Appeals, on July 16, 1993,

denied the petition for mandamus without opinion, and subsequently denied a petition for rehearing and suggestion for rehearing en banc, again without opinion.

On July 29, 1993, Petitioner filed her notice of appeal to the U. S. Court of Appeals for the Eighth Circuit. Oral argument before a panel of the Court took place on February 15, 1994. The Court of Appeals on July 6, 1994 affirmed the District Court; its opinion is set forth infra at pages A-2 through A-19. The opinion was published at 29 F.3d 367. Rehearing was denied by Order dated August 15, 1994; see page A-20, infra.

ARGUMENT

1. THE COURT OF APPEALS, IN REVIEWING THE DECISION OF THE DISTRICT COURT JUDGE WITH RESPECT TO RECUSAL, USED THE WRONG STANDARD.

There is a conflict among the Circuits as to the standard for reviewing District Court decisions on recusal. The conflict is between reviewing for abuse of discretion, and reviewing de novo. Thus, in the Fourth Circuit, the standard is unquestionably de novo. See, People Helpers Foundation v. Richmond, VA, 12 F.3d 1321, 1325 (4th Cir., 1993) ("This court reviews questions of judicial bias de novo.") On the other hand, as the instant case illustrates, the standard used in the Eighth Circuit is abuse of discretion. See, Lunde v. Helms, 29 F.3d 367, 370 (8th

Cir., 1994) ("We review rulings on motions to recuse for abuse of discretion.") See pages A-12 and A-13, infra.

In the Ninth Circuit, there appears to be disagreement among the members of the Court over the standard to be used. See, U. S. v. Chischilly, 30 F.3d 1144 (9th Cir., 1994), a case in which the majority recited use of an "abuse of discretion" standard, while in a strong dissent by Noonan, Circuit Judge, 30 F.3d at 1162, it was suggested that an objective standard should be used.

In the Tenth Circuit, the standard is abuse of discretion; see, U. S. v. Greenspan, 26 F.3d 1001, 1004 (10th Cir., 1994) ("We review the district court's denial of the motion for recusal under

an abuse of discretion standard.")

In a recent Third Circuit case, the Court of Appeals noted that "ordinarily" they review a district court's refusal to recuse pursuant to 28 U. S. Code Sec. 455 for abuse of discretion. But in that particular case, the Court of Appeals said, in a footnote, that

> . . . we . . . hold that because Judge L***'s impartiality could reasonably be questioned, his refusal to disqualify himself was an **improper exercise** of his discretion. [Emphasis supplied.]

See, Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 163 (3rd Cir., 1993); this case was brought to the attention of the panel during oral argument.

In some of the Circuits, the Courts appear to be attempting to apply recent

U. S. Supreme Court decisions to the facts of the cases before them. Thus, they are using a de novo review standard, without acknowledging that they have abandoned the older abuse of discretion standard of review. See, e.g., Aronson v. Brown, 14 F.3d 1578 (Fed. Cir. 1994); Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138, 1141 (2nd Cir. 1994); Matter of Huntington Commons Associates, 21 F.3d 157 (7th Cir. 1994). In the latter case, the Court of Appeals for the Seventh Circuit, in a case decided April 5, 1994, said its decision was governed by the U. S. Supreme Court's decision in Liteky v. U. S., ____U.S.____, 114 S.Ct. 1147, 127 L.Ed.2d 474, decided March 7, 1994. The Liteky decision further amplified some of the principles set forth in Liljeberg v.

Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). The Liljeberg decision was the centerpiece of Petitioner's oral argument before the panel in the instant case; the Liteky decision was not available at the time of the oral argument, but was brought to the attention of the Court of Appeals in the Petition for Rehearing.

Petitioner believes that the U. S. Supreme Court, in its Liljeberg and Liteky decisions, has adopted a de novo standard of review. However, in not specifically endorsing de novo review, the Supreme Court has left it open for the Courts of Appeal in the various circuits to proceed without direction and to continue to use the obsolete "abuse of discretion" standard; thus,

Petitioner's argument to the Court of Appeals for the Eighth Circuit, that a de novo standard of review should be used, fell on deaf ears.

The Court of Appeals, here, held "that the district court did not abuse its discretion in denying the motion to recuse." Lunde v. Helms, supra, 29 F.3d 367 at 370; page A-13, infra.

The Court of Appeals went on to say that:

> We do not think that the district judge's having graduated from the university law school, even though the university is a party defendant, **without more**, is a reasonable basis for questioning the judge's impartiality. [Emphasis supplied.]

But Petitioner never suggested that the mere fact that Judge Wolle graduated from the University of Iowa, one of the Respondents here, was enough to disqualify him; Petitioner was well aware of the precedents cited by the Court of Appeals, and accordingly did not seek to disqualify Judge Wolle early on, even though his bias in favor of the University of Iowa was obvious to the Petitioner from the very beginning.

The Court of Appeals, intent on justifying what they saw as the proper exercise by Judge Wolle of his discretion, then proceeded to ignore the very obvious similarity between the facts of the instant case, and the facts of the Liljeberg case, which had been explained to the panel during oral argument in as much detail

as time permitted. So eager was the Court to justify Judge Wolle that they read into the record facts which were not there. For example, the Court's opinion characterized the financial constributions Judge Wolle disclosed that he had made to the University of Iowa Law Foundation as "alumni contributions" and treated them as de minimus. But 28 U. S. Code Sec. 455 (b)(4) does not contain a de minimus exception for the term "financial interest" and (d)(4) defines "financial" interest to include a "relationship" as director, adviser, or "other active participant in the affairs of a party" which was well within the participation disclosed by Judge Wolle. The statute, in (d)(4) (i), (ii), (iii), and (iv) spelled out the exceptions;

Judge Wolle's participatioin did not fall within any of the exceptions.

In Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986), the decision affirmed by the Supreme Court in 1988, the Court of Appeals for the Fifth Circuit said, in pertinent part:

> In the present case there can be no serious doubt that Judge C****, as a member of the Loyola [University] Board of Trustees, had an interest in the well-being of Loyola University. Nor can it be doubted that that interest would be substantially affected by the outcome of the lawsuit [before the court] . . .

See, 796 F.2d 796, at 800.

In the instant case, the Court of Appeals for the Eighth Circuit said:

> . . . we do not think the district judge has any financial interest in these proceedings. We do not think that making alumni contributions or participationg in university educational programs, without more, is a reasonable basis for questioning the judge's impartiality. [Citation omitted.] Even a substantial judgment against the university would have no financial impact on the district judge as a graduate of the university law school. . . .

See, Lunde v. Helms, supra, 29 F.3d at

371, pages A-14 and A-15, infra.

Ultimately, the continued use of the "abuse of discretion" standard of review leads to decisions on recusal, such as this one, which cannot be reconciled with 28 U. S. Code Sec. 455 as currently written, nor with the applicable decisions of the U. S. Supreme Court. In accordance with Supreme Court Rule 10.1, it is respectfully urged that the considerations set forth in subparagraphs (a) and (c) thereof provide ample justification for review of the instant case on writ of certiorari.

2. THE COURT OF APPEALS TOTALLY IGNORED PETITIONER'S SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A JURY TRIAL IN SUSTAINING THE DISTRICT COURT'S SUMMARY JUDGMENT GROUNDED ON RES JUDICATA.

Petitioner amended her Complaint to allege damages, a common law remedy, and to add a request for a jury, on August 15, 1989. The ONLY reason that her Federal claims, in District Court, did not go forward to judgment at that time, was that the stay order by Judge Wolle, entered August 31, 1989, held up her Federal lawsuit for three and one-half years, while allowing the State administrative procedures pursuant to Chapter 17A, Code of Iowa, to continue. In fact, Judge Wolle's stay order improperly conditioned Petitioner's return to Federal Court upon the completion of the State administrative

case. If, and to the extent, that Judge Wolle violated Petitioner's constitutional rights to a jury trial on damages, he also violated the command of Rule 38(a), Federal Rules of Civil Procedure:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The amount in controversy set forth in Petitioner's Complaint (Amended) was and is twenty million dollars (five million dollars actual damages, fifteen million dollars punitive damages).

Petitioner's right to proceed against all Respondents, in damages, for sex discrimination in education, 20 U. S. Code Sec. 1681 et seq, is established

by the U. S. Supreme Court's decision in Franklin v. Gwinnett County Public Schools, ____U.S.____, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). The Eleventh Amendment immunity of certain of the Respondents that would otherwise exist was abrogated by Congress in the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S. Code Sec. 2000d-7.

Petitioner also has the right to a jury trial on her claims pursuant to 42 U. S. Code Section 1983, which have not been submitted to any State court or administrative agency, at any time.

[Petitioner seeks no damages relief from certain of the Respondents who are immune from such relief under Sec. 1983, but she seeks declaratory relief, which is prospective only, from all Respondents; see, Hafer v. Melo, 502 U.S.____,

112 S.Ct. 358, 116 L.Ed.2d 301 (1991).]

Petitioner voluntarily dismissed her claims for injunctive relief; all remaining claims are legal, and Petitioner's current Complaint demands a jury trial with regard to all legal claims.

The Court of Appeals also ignored the fact that Petitioner reserved her right to return to Federal court, and gave notice as required that she was not submitting her Federal claims to the State administrative proceedings, on several occasions. This was done pursuant to the U. S. Supreme Court's decision in England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

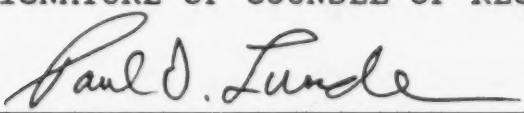
The Court of Appeals also ignored the many U. S. Supreme Court decisions

that Petitioner cited in support of her Seventh Amendment, U. S. Constitution, right to a jury trial in Federal court. See, Beacon Theatres v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990).

Finally, the Court of Appeals erred in affirming the decision of Judge Wolle granting summary judgment based on res judicata because all of the State administrative procedures took place pursuant to Chapter 17A, Code of Iowa, the Iowa Administative Procedure Act, and Sec. 17A.23 ex-

plicitly provides that "the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute now in existence or hereafter enacted. . . ." Thus, it was error to hold that a decision pursuant to Ch. 17A would be considered preclusive with respect to a suit under 20 U.S. Code Sec. 1681 or 42 U.S. Code Sec. 1983.

SIGNATURE OF COUNSEL OF RECORD:



Paul D. Lunde, Attorney for Petitioner, a member of the Bar of this Court.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2957

Karen R. Lunde, Appellant,	*	
v.	*	Appeal from the
Charles M. Helms, Associate Dean for Student Affairs and Curriculum, College of Medicine, University of Iowa; John W. Eckstein, Dean of the College of Medicine, University of Iowa; College of Medicine, University of Iowa; Hunter R. Rawlings, III, President, University of Iowa; Jerald W. Dallam, Registrar, University of Iowa; University of Iowa, State of Iowa, Appellees.	*	United States District Court for the Southern District of Iowa

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Submitted: February 15, 1994

Filed: July 6, 1994

Before McMILLIAN, WOLLMAN and MAGILL,

Circuit Judges

McMILLIAN, Circuit Judge.

Karen R. Lunde appeals from a final order entered in the District Court[1] for the Southern District of Iowa granting summary judgment in favor of defendants, the University of Iowa and several individual university officials, because res judicata barred litigation of her amended complaint. Lunde v. Helms, No. 4-89-CV-80128 (S.D. Iowa July 2, 1993). For reversal Lunde argues the district court erred in (1) denying the motion to recuse and (2) granting summary judgment in favor of defendants. For the reasons discussed below, we affirm the order of

---

[1]The Honorable Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

the district court.

The following is an abbreviated statement of the facts. The facts have been set forth in some detail in the state appellate court opinion. Lunde v. Iowa Board of Regents, 487 N.W.2d 357 (Iowa Ct. App.), cert. denied, 113 S.Ct. 377 (1992); see also Lunde v. Helms, 898 F.2d 1343 (8th Cir.) (per curiam) (appeal of stay of district court proceedings), cert. denied, 498 U.S. 897 (1990).

In 1987 Lunde received unsatisfactory reviews in three clinical rotations during her third year of medical school at the University of Iowa. The medical school placed her on academic probation. Lunde continued to have problems in clinical rotations and was granted a leave of absence. Lunde re-enrolled in

June 1988 but continued to have clinical performance problems. On February 16, 1989, following an evaluation of her clinical performance, the medical school's committee on student promotions recommended cancellation of her registration in the medical school (in effect, dismissing her). The dismissal was reviewed and affirmed by the executive committee of the medical council and by the university's vice-president of academic affairs.

Earlier, on February 1, 1989, Lunde had filed a civil rights action in federal district court, alleging that she was about to be wrongfully dismissed from medical school. She sought declaratory relief, a temporary restraining order and a preliminary injunction. She later dismissed the initial complaint

and, on February 15, 1989, filed an amended complaint alleging her dismissal was the result of sex discrimination. On Febuary 16, 1989, the district court held a hearing and denied her request for a temporary restraining order and a preliminary injunction. (That was also the day the medical school dismissed her.) On March 22, 1989, the district court heard addditional arguments. Lunde filed new motions for preliminary injunctive relief; defendants filed motions to dismiss. Lunde amended her complaint to allege her dismissal was punishment for exercising her first amendment rights and a denial of due process. In August 1989 the district court held additional hearings.

On August 31, 1989, the district court stayed further proceedings pending

the outcome of administrative and state judicial proceedings concerning Lunde's challenge to her dismissal from medical school. The district court further noted that it would vacate the stay and hold further proceedings if Lunde demonstrated that if any administrative and state judicial proceedings plainly infringed her constitutional rights or federal statutory rights and that the state courts refused to address or remedy them. Lunde appealed the stay order, and this court affirmed the stay as a matter of docket management. Lunde v. Helms, 898 F.2d at 1345.

In September 1989 the university board of regents denied Lunde's appeal of her dismissal. In October 1989 Lunde filed a petition for judicial review of the university's decision in state dis-

trict court. Lunde expressly asserted that she was reserving her federal claims for litigation in federal district court; nevertheless, she vigorously litigated all of her federal claims in the state courts. Specifically, Lunde claimed that she was entitled to "contested case" procedures[2] and that defendants had discriminated against her on the basis of sex and had denied her freedom of speech, due process and equal protection. The state district court ruled that the dismissal was not a contested case under state law

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[2]Under state law a "contested case" requires a formal, adversarial, evidentiary hearing before the state agency. By contrast, "other agency action" requires no more than an informal hearing. See Lunde v. Iowa Bd. of Regents, 487 N.W.2d 357, 359-360 (Iowa Ct. App.), cert. denied, 113 S.Ct. 377 (1992). In the present case the university and the medical school did not follow the contested case procedures and instead followed the informal procedures set forth in the medical school student handbook.

and, following a full adversarial trial, including the opportunity to present new evidence and to cross-examine witnesses, found that Lunde had been dismissed solely for academic reasons, not because of sex discrimination or in retaliation for expressing political views or opinions critical of medical school professors, and had not been denied due process or equal protection. The state appellate court affirmed, the state supreme court declined review, and the Supreme Court denied Lunde's petition for writ of certiorari.

Lunde then returned to federal district court and moved to dissolve the stay. She also moved to recuse the district judge on the ground of bias and prejudice. The district court vacated the stay, denied the motion to recuse

and granted Lunde leave to file an amended complaint, adding a Title IX damages claim and a demand for a jury trial. Defendants filed an answer and a motion for summary judgment. Following a hearing conducted by telephone conference call, the district court granted summary judgment in favor of defendants on the ground of res judicata. The district court specifically noted that Lunde had already litigated in state court her claims that she had been dismissed from medical school because of sex discrimination, in retaliation for expressing her political views or opinions critical of medical school professors or in violation of due process and equal protection. Slip op. at 7-13. This appeal followed. We affirm.

MOTION TO RECUSE

Lunde first argues the district court erred in denying the motion to recuse. Lunde argues the district judge was biased and prejudiced against her, in part because of his association with the University of Iowa, a party defendant. The district judge is a graduate of the University of Iowa College of Law. Lunde also argues the district judge has a "financial interest" in the University of Iowa because he had made financial contributions to the Iowa Law School Foundation and had presented two educational programs at the University of Iowa. Lunde further argues the district judge had a financial interest because her lawsuit, if successful, would result in a multi-million dollar judgment against the University of Iowa.

As a preliminary matter, we note

that the district court could have denied the motion to recuse as untimely filed. The original complaint was filed in February 1989; the first amended complaint was filed in August 1989. The motion to recuse was not filed until December 1992. Allowing for the time the federal proceedings had been stayed, some seven or eight months had elapsed between the filing of the complaint and the motion to recuse. See, e.g., Willner v. University of Kansas, 848 F.2d 1023, 1028 (10th Cir. 1988) (motion to recuse filed some 10 months after complaint was untimely) (citing cases), cert. denied, 488 U.S. 1031 (1989). However, the district court did not rely on this ground and denied the motion to recuse on the merits.

We review rulings on motions to

recuse for abuse of discretion. See, e.g., Gray v. University of Arkansas, 883 F.2d 1394, 1398 (8th Cir. 1989) (judge's partnership five years earlier with member of Board of Trustees, a party defendant, was not grounds for recusal). The test is one of objective reasonableness, that is, whether the judicial officer's impartiality might reasonably be questioned under the circumstances. See 28 U.S.C. Sec. 455(a).

We hold the district court did not abuse its discretion in denying the motion to recuse. We do not think that the district judge's having graduated from the university law school, even though the university is a party defendant, without more, is a reasonable basis for questioning the judge's impar-

tiality. See Easley v. University of Michigan Board of Regents, 906 F.2d 1143, 1146-47 (6th Cir. 1990) (judge's graduation from and affiliation with law school, which was party defendant, not grounds for recusal, absent evidence that judge was privy to extrajudicial information relating to student's situation at law school), cert. denied, 499 U.S. 947 (1991); Brody v. President of Harvard College, 664 F.2d 10, 11 (1st Cir. 1981) (per curiam) (judge's having attended or graduated from university which was party to case, without more, not grounds for recusal), cert. denied, 455 U.S. 1027 (1982).

In addition, we do not think the district judge has any financial interest in these proceedings. We do not think that making alumni contribu-

tions or participating in university educational programs, without more, is a reasonable basis for questioning the judge's impartiality. See Willner v. University of Kansas, 848 F.2d at 1028 (participation in alumni activities). Even a substantial judgment against the university would have no financial impact on the district judge as a graduate of the university law school.

RES JUDICATA

Lunde next argues the district court erred in granting summary judgment in favor of defendants on the ground of res judicata. The district court held that Lunde's federal constitutional and statutory claims had already been fully and fairly litiga-

ted in the state courts and that therefore res judicata barred litigation of her federal action.

Lunde first argues the district court improperly stayed her federal action. These arguments were resolved against her on the merits in the first appeal and will not be reconsidered in this appeal. See Lunde v. Helms, 898 F.2d at 1345 (interlocutory appeal of stay treated as petition for mandamus; holding district court did not abuse its discretion in staying federal case pending resolution of ongoing state proceedings as matter of docket management).

Lunde also argues the district court erred in holding that the state court judgment barred any subsequent federal litigation. She argues that

applying the doctrine of res judicata merely compounded the error involving the improper stay. We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Insurance Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992). We agree with the district court

that litigation of Lunde's federal action was barred by the prior state court judgment and therefore defendants were entitled to judgment as a matter of law.

"Res judicata bars relitigation of a claim if: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." Lane v. Peterson, 899 F.2d 737, 741 (8th Cir.), cert. denied, 498 U.S. 823 (1990); see also Israel v. Farmers Mutual Insurance Ass'n, 339 N.W. 2d 143, 146-47 (Iowa 1983) (similar analysis); cf. University of Tennessee v. Elliott, 478 U.S. 788, 798-99 (1986) (preclusive effect given to decision of state agency acting in judicial capa-

city). All three requirements were met in the present case. Lunde fully and vigorously litigated her sex discrimination, first amendment, due process, and equal protection claims in state court. The state court judgment was a final judgment on the merits rendered by a court of competent jurisdiction. The parties were essentially the same in both cases. The state and federal lawsuits involved the same cause of action, that is, the same nucleus of operative facts. Lane v. Peterson, 899 F.2d at 742, citing Restatement (Second) of Judgments Sec. 24 (1980).

Accordingly, we affirm the order of the district court.

A true copy. Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2957SIDM

Karen R. Lunde,	*	
	*	Order Deny-
Appellant,	*	ing Petition
	*	for Rehear-
v.	*	ing and
	*	Suggestion
Charles M. Helms, etc.,	*	for Rehear-
	*	ing En Banc
et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 15, 1994

Order Entered at the Direction of the Court.

/s/ Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

KAREN R. LUNDE,

PETITIONER

vs.

CHARLES M. HELMS, ET AL.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

KAREN R. LUNDE, Plaintiff,	NO. 4-89-CV-80128
vs.	RULINGS AND
CHARLES M. HELMS, Associate Dean for Student Affairs and Curriculum, College of Medicine, University of Iowa; JOHN W. ECKSTEIN, Dean of the College of Medicine, University of Iowa (sic); HUNTER R. RAWLINGS III, President, University of Iowa; JERALD W. DALLAM, Registrar, University of Iowa; and the UNIVERSITY OF IOWA, State of Iowa, Defendants.	SUMMARY JUDGMENT FOR DEFENDANTS

At hearings on May 25, June 3, and July 1, 1993, counsel have presented

oral arguments on several motions fully briefed by the parties: motions for summary judgment in whole or in part; plaintiff's request for jury trial of some issues; and plaintiff's motion to amend this court's order entered on June 3, 1993, that allowed plaintiff to dismiss several claims. The court has also commenced a final pretrial conference and addressed issues presented by plaintiff's proposed jury instructions.

The court now rules on these motions and concludes defendants are entitled to summary judgment on all claims plaintiff now asserts against them. The clerk of court shall enter summary judgment in favor of defendants and against plaintiff, with costs assessed to the plaintiff.

BACKGROUND

Entry of summary judgment simply marks another way station in the travels of these litigants through Iowa's federal and state trial and appellate courts. The odyssey began even before February 16, 1989, when plaintiff's registration as a third-year student in the University of Iowa College of Medicine was cancelled.

Plaintiff's father, her lawyer, first filed a complaint in this court on February 1, 1989, seeking injunctive and declaratory relief against defendants who are the president and other officials of the University of Iowa. At the commencement of a hearing on plaintiff's request for preliminary injunction, she dismissed her complaint without prejudice. On February 15, 1989, she filed a second lawsuit almost identical to the first. This

court held a hearing and denied preliminary injunctive relief. Plaintiff's appeal to the court of appeals was unavailing.

In August of 1989, the court held two evidentiary hearings on the plaintiff's renewed motion for preliminary injunction and defendants' motion to dismiss the complaint as amended. The court denied injunctive relief but also denied the defendants' motion to dismiss on the grounds of abstention and failure to state a claim. This court exercised its discretion not to dismiss based on Younger abstention. Instead the court exercised its discretion

> to stay further proceedings in this court pending the outcome of administrative and State judicial proceedings concerning plaintiff's challenge to her dismissal from medical school.

In the ruling of August 31, 1989, this court made clear that it would lift the

stay and hold further proceedings in this action if the plaintiff demonstrated

> that any administrative and judicial proceedings plainly infringe the constitutional rights or federal statutory rights of the plaintiff in respects that the State judiciary cannot or will not address and remedy.

Order, August 31, 1989. The Court of Appeals for the Eighth Circuit again denied plaintiff's appeal from that decision. See 898 F.2d 1343 (8th Cir. 1990).

The three-volume Appendix filed with the Clerk of the Iowa Supreme Court, as well as other papers in this summary judgment record, adequately elaborate on this background and reflect the extensive administrative and judicial proceedings that followed this court's ruling. Plaintiff

was unsuccessful in obtaining relief on administrative review of the defendants' decision that resulted in her dismissal as a medical student. Plaintiff then filed a civil action in the Iowa District Court for Polk County. That judicial review proceeding resulted in a six-day trial in 1991. Prior to the trial the court rejected plaintiff's contention that due process required that she be allowed an evidentiary hearing at the administrative level. At the conclusion of the trial, the Iowa district court judge, Hon. Robert A. Hutchison, entered a final judgment--entitled "Findings of Fact, Conclusions of Law and Order"--that addressed the merits of all claims and decided all issues adversely to the plaintiff. The termination of her status as a medical

student was upheld. The court explicitly held that plaintiff had not proved her claims that she was terminated by reason of sex discrimination, infringement of First Amendment rights, and denial of equal protection. Plaintiff's motions for new trial, reconsideration, or other appropriate relief were denied. The district court did clarify in its post-trial ruling that petitioner's sex discrimination and First Amendment claims were without factual basis, in part because neither her gender nor her expression had played a role in her dismissal. Plaintiff appealed those rulings, but the Iowa Court of Appeals affirmed the decision of the district court in an unpublished fourteen-page opinion and the Iowa Supreme Court denied plaintiff's

application for further review. Plaintiff's petition for a writ of certiorari in the United States Supreme Court was denied on October 19, 1992.

This court has now lifted its previous stay and explored the entire record to determine whether plaintiff is entitled to trial of any of the issues she now asserts in her amended complaint. For the reasons that follow, this court concludes principles of res judicata bar plaintiff's attempt to obtain relief in this court. She is not entitled to a jury trial or a bench trial.

PRINCIPLES GOVERNING RES JUDICATA AND SUMMARY JUDGMENT

Defendants seek summary judgment on the theory that all claims of the plaintiff in this lawsuit are precluded

because they arise out of the same nucleus of facts as the claims that were litigated in the Iowa administrative and judicial proceedings. Defendants also assert the related theory of issue preclusion, contending that issues fundamental to plaintiff's present theories for recovery were actually litigated in the state court, were necessary to the outcome of the state court proceedings, and were decided against the plaintiff. Defendants contend plaintiff had full and fair opportunity and the incentive to litigate in the prior action all issues of liability now asserted in this action. Claim preclusion and issue preclusion, as separate applications of res judicata, are explained in Lane v. Peterson, 899 F.2d 737, 741 n.3 (8th Cir.), cert. denied, 111 S.Ct. 74 (1990).

These principles have long been applied by Iowa courts and the Court of Appeals for the Eighth Circuit. See, e.g., Israel v. Farmers Mut. Ins. Ass'n, 339 N.W.2d 143, 146-47 (Iowa 1983) (explaining elements of claim and issue preclusion that may bar litigation of claims); Clarke v. Redeker, 406 F.2d 883, 885 (8th Cir.), cert. denied, 396 U.S. 862 (1969) (damage action for violation of constitutional rights barred by previous action on essentially same underlying facts seeking injunctive relief).

The United States Supreme Court has held that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal civil rights action as they would enjoy in the courts of the State that rendered the judgment. Allen

v. McCurry, 449 U.S. 90, 96-97 (1980). In determining what preclusive effect to give a state judgment, the federal court must apply the law of the state court that entered the judgment. Migra v. Warren City Sch. Dist. Bd., 465 U.S. 75, 85-87 (1983); see Comment, Claim Preclusion and Section 1983 Civil Rights Actions: Migra v. Warren City Sch. Dist. Bd., 70 Iowa L. Rev. 287 (1984).

Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. Fed. R. Civ. P. 56. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51 (1986); Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). In deciding whether material fact issues are present, the court reviews the summary judgment record in a light most favorable to the party resisting summary judgment. This summary judgment record includes the administrative record as well as all proceedings before the Iowa trial court and Iowa appellate courts. There is no dispute about the substance of the final judgment entered in the Iowa district court, affirmed by Iowa's appellate courts.

PLAINTIFF'S MOTION TO AMEND ORDER

During the hearing on July 1, 1993, the court permitted plaintiff to withdraw her oral motions to dismiss her section 1983 equal protection and due process claims and her section 1983

First Amendment claim against all defendants except defendant Helms. Defendants contend that plaintiff had in fact dismissed those claims with prejudice, with the court's permission, at the hearing on June 3, 1993. The court agrees with defendants' counsel concerning what took place at the June 3 hearing.

But the court has permitted plaintiff to withdraw the motion her counsel made to dismiss with prejudice, because there was no court reporter present during the hearing on June 3 and because there is no showing plaintiff Karen R. Lunde authorized her father, as attorney, to dismiss those claims with prejudice. The court does not now order dismissal of those claims without prejudice. It is not clear the plaintiff, as distinguished from her counsel, knows that the effect

of a dismissal without prejudice of her section 1983 claims would probably be to bar them because of Iowa's two-year statute of limitations. Because the court now grants summary judgment for defendants and against plaintiff on all claims, the court deems moot the issue of whether plaintiff should be permitted to dismiss any of her claims without prejudice. Court permission for dismissal without prejudice at this stage of the proceeding is required. Fed. R. Civ. P. 41(a)(2).

The court will now address in turn the plaintiff's claims of infringement of freedom of speech, violation of her due process and equal protection rights, and sexual discrimination.

PLAINTIFF'S FIRST AMENDMENT CLAIMS

Plaintiff's First Amendment claim

for prospective injunctive relief against all defendants is grounded in a July 29, 1988 letter written to plaintiff by pediatrics professor Dr. Alfred Healy in which he explains the grade she would receive from him for unsatisfactory performance on a rotation he supervised. In essence he stated that her lack of interpersonal skills interfered with her treatment of patients. Plaintiff isolates one sentence in the letter and argues that Dr. Healy gave her a failing grade in the course, causing defendants to take adverse action against her, because of what she had said. Plaintiff additionally contends defendant Helms is liable for damages because he failed to inform the other defendants, when they were considering dismissal of the plaintiff from medical

school, that plaintiff's father had written a letter asserting infringement of her First Amendment rights.

The only difference between plaintiff's First Amendment claims in this lawsuit and the First Amendment claims she asserted in the Iowa judicial proceedings is in the remedies she seeks. The evidence supporting her theory for recovery is not different here than in the state proceedings. The state court addressed the merits of this claim and found for defendants. Claim and issue preclusion bar plaintiff's First Amendment claim.

Moreover, these claims are frivolous. Nothing in this summary judgment record suggests that Healy's evaluation of plaintiff was grounded on the content of her speech. Neither is

there in this record evidence that the other defendants understood Healy's evaluation to be anything other than an evaluation of plaintiff's ability to communicate with other health care professionals. The evidence is that Healy was concerned with plaintiff's lack of communication skills. Healy testified about the importance of effective communication between health care professionals and his concern that "plaintiff was interacting with me in a way that called attention to her and not the rest of the group nor to the subject that was under discussion." He believed that "her performance was not consistent with accepted standards of interactional style between professionals caring for patients." Healy's letter, read in context, addresses

only plaintiff's behavior. Plaintiff raised her federal constitutional claim before the Iowa District Court for Polk County, the Iowa Supreme Court and the United States Supreme Court. The district court on a like record found that Dr. Healy's opinion was not based upon the plaintiff's expression of political views or contrary medical opinions; he was concerned only that her manner of speaking was disruptive of the academic process.

Plaintiff's First Amendment claim is barred by res judicata and also is spurious. The court grants the defendants' motion for summary judgment on the claim that they infringed rights guaranteed her by the First Amendment of the United States Constitution.

PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION CLAIMS

The gist of the due process and equal protection claims plaintiff asserted in this lawsuit was that plaintiff's registration in medical school was cancelled illegally because she had not received an appropriate evidentiary hearing during the administrative proceedings and was treated differently than other members of her medical school class. The Iowa state trial court in a preliminary ruling held that plaintiff was not entitled to present a full evidentiary hearing before the Iowa Board of Regents, but the court also held that plaintiff would be entitled to present a full factual record before the district court. This resulted in the six-day evidentiary

trial in the Iowa trial court. On appeal, the Iowa Court of Appeals addressed and decided adversely to plaintiff her due process claim. See Court of Appeals decision, 3/24/92, at pp. 4-9.

The Iowa trial court specifically addressed and decided adversely to plaintiff her equal protection claim, noting that a "classification" in which she compared herself with other members of her medical class was unduly restrictive. The court concluded there had been no denial of equal protection.

In plaintiff's resistance to summary judgment, trial brief, and other papers filed in this case she has not presented any factual or legal support for her claims of viola-

tion of due process or deprivation of equal protection rights guaranteed by the United States Constitution. Her claims here are no different than the claims presented in the Iowa administrative and judicial proceedings. Claim preclusion bars her relitigation of those theories in this court.

PLAINTIFF'S SEX DISCRIMINATION CLAIMS

Plaintiff bases her sex discrimination claims on 20 United States Code section 1681 et seq, often referred to as the Title IX education amendments of 1972. She relies on the holding of Franklin v. Gwinnett County Pub. Schs., 117 L.Ed.2d 208, 224 (1992), that concluded a damage remedy could be implied from that Title IX statute prohibiting sex discrimination. In summary, she contends the defendants violated her

rights under that statute and damaged her by dismissing her as a medical student based on their "sex stereo-typical comments about her" in making grading decisions and by treating her differently than men students.

To decide whether the claims here are precluded by the judgment entered in the Iowa trial court and appellate courts, this court must compare the evidence and theory of discrimination in the two cases. The evidence plaintiff would present in this case is essentially the same as that presented in the Iowa district court. The theory that plaintiff was damaged by sexual discrimination because she was not allowed to complete her medical education is not different than the theory in the Iowa trial court and appellate

courts that she was dismissed by reason of sexual discrimination. Here, as in that case, plaintiff contends this is a "mixed motives" civil rights case, invoking the burden-shifting analysis of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and its progeny.

The Iowa district court, after considering basically the same evidence as is in this summary judgment record, decided the sex stereotype and sexual discrimination issues adversely to plaintiff's position. The trial court discussed plaintiff's theory, cited Price Waterhouse, but then concluded:

> Based upon its view of the evidence in this case, the court concludes that it makes no difference what analysis is used in making its determination. In any event, [plaintiff's] dismissal from medical

school must be upheld.

> The problem with [plaintiff's] claims of discrimination on the basis of sex is not the legal basis for her claims, but the factual basis. While there is certainly evidence that critical comments were made concerning [plaintiff's] dress and aggressiveness, there is no evidence to support the proposition that a different standard was applied to male and female students, in that aggressiveness was encouraged in male students but not in female students. From all the evidence adduced at trial, it is clear that doctors of all kinds, regardless of race, sex, or other criteria, are expected to be aggressive in carrying [sic] for their patients and treating their medical problems. However, they are also expected to be professional in their dealings with patients, staff and peers. It is clear to the Court that the context of comments in the evaluations concerning [plaintiff's] aggressiveness were made in the sense of professionalism, that is that [plaintiff] was failing to act in a manner appropriate to any and all physicians. Such a criterion is not only not improper, but is laudable and certainly a legitimate goal for the medical school faculty to seek in its graduates.

The Iowa Court of Appeals affirmed that finding and decision. See Court of App-

eals decision, p. 5, n.5.

Plaintiff's sex discrimination claim in this court is barred by issue preclusion. This court recognizes that here plaintiff seeks damages, whereas in the state proceedings in the plaintiff sought reinstatement as a student. But the nucleus of facts underlying that claim for reinstatement and the claim here for damages is the same. The issue whether defendants inappropriately discriminated against plaintiff because she is a woman was addressed and decided adversely to the plaintiff. The elements of issue preclusion are satisfied. Plaintiff has no right to have those facts weighed by a different fact-finder and decided differently. The final decision in this case, made in the Iowa administrative and judicial proceedings, is that plain-

tiff was not evaluated differently from other students or discriminated against because she is a woman.

Plaintiff argues she should not be barred by res judicata from having a trial on her sexual discrimination and First Amendment damage claims because she is entitled to a jury trial on those claims. She relies on Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990).

Lytle is inapposite. There, the court refused to apply collateral estoppel effect to a district court's determinations of issues common to equitable and legal claims, when the court had resolved the equitable claims first by erroneously dismissing the legal claims. Id. at 555-56. Here, the Iowa trial court and appellate courts were not presented with legal issues but decided

the fact issues plaintiff presented in thorough and conclusive decisions on the merits. Moreover, plaintiff has cited no authorities for her theory that her Title IX sexual discrimination claim is triable to a jury rather than to the court in a bench trial.

This case is similar to Clarke v. Redeker, 406 F.2d at 884, where the plaintiff first sought an injunction against having to pay a higher nonresident tuition, then sought damages for having to pay the higher tuition in a subsequent lawsuit. The court held the second action, seeking damages, was barred by res judicata. Id. at 885. Plaintiff has no persuasive legal authority for avoiding the preclusive effect of the state court judgment that found her termination from medical school did

not violate her rights under applicable statutes and provisions of the United States Constitution. Sound judicial administration and principles of full faith and credit and federalism support this court giving preclusive effect to the decisions of the Iowa courts. Cf. University of Tennessee v. Elliott, 478 U.S. 788, 798-99 (1986) (giving preclusive effect to fact-finding of a state agency when it acted in a judicial capacity, resolved disputed issues of fact, and provided the parties adequate opportunity to litigate).

Finally, this court returns to a theme underlying its ruling denying preliminary injunctive relief on August 31, 1989. Important state interests are implicated in allowing professional university administrators and faculty per-

sons to determine what students are meeting academic standards and, more specifically, what medical students should be retained in programs at Iowa's Regent's universities. Plaintiff has had full and fair hearings and a complete evidentiary proceeding addressing all complaints about her dismissal from the University of Iowa College of Medicine. She is entitled to no further trial on her damage claims.

The clerk of court shall enter summary judgment in favor of defendants and against plaintiff, dismissing her claims and assessing costs to plaintiff.

IT IS SO ORDERED.

Dated this 2nd day of July, 1993.

/s/ Charles R. Wolle, Judge
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

(3)

94-1169

No. _____

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1994

KAREN R. LUNDE,

Petitioner,

vs.

CHARLES M. HELMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. IS REVIEW FOR ABUSE OF DISCRETION REVERSIBLE, WHEN THE RESULT ON THE ISSUE OF JUDICIAL RECUSAL WOULD HAVE BEEN THE SAME, IF REVIEWED DE NOVO?

2. IS PLAINTIFF ENTITLED TO A FEDERAL TRIAL, EITHER JURY OR BENCH, AFTER FULLY LITIGATING HER FEDERAL CLAIMS IN STATE COURT, AND DENIED REVIEW IN THIS COURT?

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No. _____

In The

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October Term, 1994

KAREN R. LUNDE,

Petitioner,

vs.

CHARLES M. HELMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

The Respondents Charles M. Helms, John W. Eckstein, the University of Iowa College of Medicine, University of Iowa President Hunter R. Rawlings III, Registrar Jerald W. Dallam, and the State University of Iowa respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on August 15, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is included as an appendix to the petition and has been published as *Lunde v. Helms*, 29 F.3d 367 (8th Cir. 1994). In addition, the unreported decision of the Iowa District Court on April 12, 1991, is included in the appendix to this brief in opposition.

STATEMENT OF THE CASE

This case was originally brought pursuant to 42 U.S.C. § 1983 alleging violations of the Petitioner's rights under the First and Fourteenth Amendments to the United States Constitution, 20 U.S.C. § 1681, and Iowa Code chapter 17A, the Iowa Administrative Procedures Act. Petitioner claimed her dismissal from medical school for academic reasons violated her rights to freedom of speech, due process and equal protection, and denied her a "contested case proceeding," pursuant to state law. The Petitioner initially sought declaratory and injunctive relief.

The facts have been set forth in detail in the trial court opinion attached to this brief in opposition. (Resp. App. p. 1.) As described, this litigation began when the University Committee on Student Promotions scheduled an appearance for the Petitioner before the Committee on February 13, 1989, to review her academic performance. On February 15, 1989, Petitioner filed her original complaint in the federal district court. Petitioner appealed the decision to dismiss her to the Executive Committee of the Medical Council, the vice president of Academic Affairs

and ultimately to the governing body, Iowa State Board of Regents. On August 31, 1989, the federal district court stayed further proceedings pending the outcome of administrative and state judicial proceedings concerning Petitioner's challenge to her dismissal. On September 21, 1989, the Board of Regents denied Petitioner's appeal.

On October 25, 1989, Petitioner filed a Petition for Judicial Review of the Regents' decision in the Iowa District Court. Although the Petitioner asserted a reservation of federal claims for later litigation in federal court, she vigorously litigated all of her federal claims in the Iowa court. On February 25, 1991, through March 4, 1991, trial was held and on April 12, 1991, the Iowa district court concluded that Petitioner's rights to freedom of speech, due process, and equal protection were without merit, and she was not the victim of sex discrimination. (Resp. App. p. 1.)

In response to Petitioner's motion for new trial, the Iowa district court reiterated on April 30, 1991, that the claims of sex discrimination, freedom of speech, due process and equal protection had no factual basis and played no role in Petitioner's dismissal. Petitioner appealed the state court decision asserting error in failing to find her dismissal was in violation of her federal rights. On March 24, 1992, the Iowa Court of Appeals rejected each of the federal grounds raised by the Petitioner and affirmed the decision of the Iowa district court.

On April 11, 1992, Petitioner filed an application for further review of the decision of the Iowa Court of Appeals with the Iowa Supreme Court. That application

again raised all of the alleged violations of federal constitutional and statutory rights, and was on May 28, 1992, denied.

On August 27, 1992, Ms. Lunde filed a Petition for Writ of Certiorari in this Court, asserting once again her federal claims (S. Ct. No. 92-365). In her petition, Petitioner listed due process, equal protection, free speech, and sex discrimination among her issues (Petition for Writ, No. 92-365, p. iii). On October 19, 1992, this Court denied her petition for writ. (___ U.S. ___, 113 S. Ct. 377, 121 L. Ed. 2d 288.)

Petitioner then returned to her federal action, and on December 8, 1992, moved for the recusal of the Honorable Charles R. Wolle. On the same date, she filed her Amended Complaint which sought damages and for the first time, a jury trial. These Respondents filed their motion for summary judgment on April 8, 1993, asserting issue preclusion. On July 2, 1993, the district court denied the request for recusal and entered summary judgment for the Defendants.

Petitioner appealed to the Eighth Circuit, which court affirmed the district court on July 6, 1994. Petition for rehearing was denied on August 15, 1994 (Pet. App. 2, 20).

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS IN THIS CASE TO GRANT CERTIORARI TO REVIEW A JUDICIAL RECUSAL DECISION.

The petition for certiorari raises no important issue which needs to be resolved by this Court. In purported compliance with Supreme Court Rule 10, Petitioner Lunde asserts the Eighth Circuit decision is "in conflict with the decision of another United States Court of Appeals." The conflict between the Fourth Circuit and the Eighth is on the standard for reviewing district court decisions on recusal. *See People Helpers Foundation v. Richmond, Virginia,* 12 F.3d 1321, 1325 (4th Cir. 1993) (de novo); *Lunde v. Helms,* 29 F.3d 367, 370 (8th Cir. 1994) (abuse of discretion) (Pet. App. 12).

Petitioner Lunde asserts that this Court has determined the standard for review of questions of judicial bias is de novo or alternatively this Court has yet to clearly delineate the proper standard. (Petition pp. 38-39.) The question presented by Petitioner is simply whether the Eighth Circuit standard for review is correct.

Rule 10 describes the grant of certiorari as discretionary. Not only must there be a conflict among the circuits, but "special and important reasons" must also exist. Petitioner's issue is neither important nor recurring. *See Shapiro v. United States,* 335 U.S. 1, 4 (1948); *Fuller v. Oregon,* 417 U.S. 40, 42 (1974). Respondent would suggest that resolution of the distinction between de novo and abuse of discretion standards is not a "most troublesome question in the administration of justice." *Linkletter v. Walker,*

381 U.S. 618, 620 (1965). Given the facts of this case, there is no significant federal question to be resolved.

II. THE STANDARD OF REVIEW OF THE DISTRICT COURT'S DENIAL OF A REQUEST FOR RECUSAL IS NOT DETERMINATIVE OF THE COURT'S DECISION. THE RESULT WOULD BE THE SAME.

Lunde alleged that because Judge Wolle, as a graduate of the University of Iowa, made contributions to the University of Iowa Law Foundation, he had a "financial interest" in the outcome of this litigation as that term is defined in 28 U.S.C. § 455(b)(4). Alumni contributions do not constitute sufficient entanglement to make Judge Wolle an "active participant" in the affairs of the University of Iowa. Contrary to Lunde's assertions, it is not necessary to even discuss the exceptions to the rule. Judge Wolle was neither a board of trustee member (*see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988)), nor as a mere graduate and donor did he have an interest that would be substantially affected by the outcome of the lawsuit. ["Even a substantial judgment against the University would have no financial impact on the district judge . . . " *See Lunde v. Helms*, 29 F.3d at 371 (Pet. App. 14).]

It is apparent from a review of the Eighth Circuit opinion (Pet. App. 13) that whatever standard for review is utilized, the decision of the Circuit was correct. Judge Wolle's impartiality could not reasonably be questioned absent any evidence that the judge was privy to any extra-judicial information. *Easley v. University of Michigan*

Board of Regents, 906 F.2d 1143 (6th Cir. 1990), cert. den., 499 U.S. 947 (1991); *Brody v. President of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981). Were certiorari to be granted, so that this Court might resolve the asserted conflict, the decision as to Petitioner Lunde would remain the same. The resolution of the conflict will not change the result. Certiorari should be denied. *Sommerville v. United States*, 376 U.S. 909 (1964).

As a separate and independent ground, the motion to recuse could have and should have been denied as untimely. (Pet. App. 12; citing *Willner v. University of Kansas*, 848 F.2d 1023 (10th Cir. 1988), cert. den., 488 U.S. 1031 (1989). However, both the district court and the Eighth Circuit did not rely on this ground and denied the motion on the merits.

III. PETITIONER UNRESERVEDLY LITIGATED HER FEDERAL CLAIMS IN THE STATE COURT AND SOUGHT REVIEW OF THE ADVERSE DECISION IN THIS COURT. THE DECISION TO DENY HER REQUEST TO START OVER AGAIN WITH A JURY TRIAL WAS CORRECT.

The district court stayed the proceedings in this case because of ongoing state litigation in which there was an adequate opportunity to raise constitutional challenges. Petitioner Lunde appealed and the Eighth Circuit affirmed the entry of the stay. *Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir. 1990).

The administrative proceedings at the College of Medicine had already begun when Lunde filed her federal complaint. The district court decision unquestionably

demonstrates that judicial review afforded Lunde a full and fair opportunity to litigate each and every federal claim. She raised each of those claims and each was decided adversely to her. Lunde thereafter took advantage of the opportunity to seek review of the state court's decision in this Court. (No. 92-365) Lunde's request for certiorari review of her federal claims was denied. ___ U.S. ___, 113 S. Ct. 377, 121 L. Ed. 2d 288.

Following that denial, Respondents collectively filed a motion for summary judgment alleging issue preclusion. Lunde responded in the federal district court, as she does here, by arguing that she had reserved her federal claims and because of her amended complaint she was entitled to a jury. Summary judgment was granted because all of the federal claims raised by the Petitioner had been addressed by the Iowa courts and Lunde had had a full and fair opportunity to litigate those claims.

Lunde's petition alleges denial of her constitutional right to a jury trial. The allegation is frivolous. Lunde suggests that under *England v. Louisiana Medical Examiners* she appropriately reserved her right to a federal determination of her federal claims. 375 U.S. 411, 418-419 (1964). *England* itself dictates the results of this petition.

> But we see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. . . . We now explicitly hold that if a party freely and without reservations submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then –

> whether or not he seeks direct review of the state decision in this Court – he has elected to forego his right to return to the District Court.

England v. Louisiana Medical Examiners, 375 U.S. at 419.

Although it is true that Lunde attempted an *England* "reservation of rights", it is clear from the history of this case that her reservation was intended only as an escape route should the state courts render an adverse ruling. She vigorously asserted her federal claims in state trial court, on appeal to the state supreme court, and on petition for certiorari to this Court. This is precisely the situation in which issue preclusion was held to apply in *England*.

Lunde's belated claim of a constitutional right to a jury trial is of no consequence to the resolution of her litigation. As the district court determined: "she is not entitled to a jury trial or a bench trial." Her action is barred by issue preclusion. The Seventh Amendment is not violated by granting a motion for summary judgment on issue preclusion grounds. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979).

"Lunde fully and vigorously litigated her sex discrimination, First Amendment, due process, and equal protection claims in state court. The state court judgment was a final judgment on the merits rendered by a court of competent jurisdiction." *Lunde v. Helms, et al.* (Pet. App. 19). She has had her day in court; she's not entitled to another.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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IN THE DISTRICT COURT OF IOWA
IN AND FOR POLK COUNTY

KAREN R. LUNDE, Petitioner, v. STATE BOARD OF REGENTS, Respondent.	:	CASE NO. AA 1583 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Filed Apr. 12, 1991)

On February 25, 1991, the above-captioned matter came on for trial to the Court. Petitioner appeared in person and by her attorney, Paul D. Lunde. Respondent appeared by its attorney, John M. Parmeter. Trial continued through March 4, 1991; the parties were given until March 22, 1991 to submit any post-trial briefs or arguments which they wished the Court to consider. The matter was deemed submitted on March 22, 1991. After hearing the testimony of the witnesses, reviewing the exhibits admitted into evidence and the court file (including the post-trial briefs), and being fully advised in the premises, the Court now enters the following ruling.

Petitioner filed this action in pursuit of her appeal of her dismissal from the University of Iowa Medical School in 1989. Petitioner has raised several claims in contesting her dismissal. First, she alleges that she was improperly denied contested case treatment in proceedings below, from the actions of the Student Promotions Committee through the Board of Regents' denial of her appeal.

Respondent agrees that petitioner's challenge to her dismissal was not treated as a contested case, but argues that petitioner was not entitled to contested case treatment. This Court has previously ruled, on September 12, 1990, that petitioner was not entitled to proceedings below as a contested case. However, this Court further ruled that because it viewed this proceeding as one involving "other agency action," petitioner would be allowed to make a full factual record at the time of the February 25, 1991 hearing concerning all of her claims.

Aside from her claim that she was entitled to contested case treatment, petitioner argues that her dismissal from the medical school was improper because the reasons stated were without factual basis, and because in fact her dismissal was caused by petitioner's exercise of her rights to freedom of speech and by discrimination on the basis of sex. Petitioner further contends that she was denied equal protection because no other medical students in her class, having passed all the courses required for third-year students, were dismissed from the medical school despite the passing performance. Petitioner has asked the Court to set aside her dismissal, reinstate her to the medical school, and for further relief, all in the context of this action.

Karen Lunde was began [sic] as a student to the University of Iowa College of Medicine in the fall of 1985. Prior to that time, she had an excellent academic and personal background. She had graduated from the University of Iowa undergraduate program in the spring of 1985 with a degree in biomedical engineering with highest distinction. Petitioner was one of the youngest, if not the youngest, members of her medical school class,

having in effect skipped two years of school between kindergarten and 12th grade.

During her first two years of medical school, Karen received passing grades in all of her courses. However, her passage through these two years was not unremarkable to the faculty. Various professors brought petitioner to the attention of Associate Dean Aschenbrener because of problems the professors perceived Karen had in interacting with her peers, and because of grades they viewed as only marginally passing. At one point Dean Aschenbrener suggested the possibility of a leave of absence for Karen, in order for her to work on developing her interactional skills. However, Karen's mother strenuously objected to such a leave, and Karen proceeded to her second year of medical school.

During her second year, Karen once again came to the attention of Dean Aschenbrener because it was noted that she was frequently sleeping in classes. Indeed, petitioner underwent a sleep disorder evaluation as a result of faculty concerns, but no physical cause for Karen's sleeping in class was identified. There was continued concern about Karen's ability to interact with others. During both the first and second years of medical school, concerns were raised by faculty members as to grades they viewed as only marginally passing. Nevertheless, Karen began her third year of medical school.

The third and fourth years of medical school are significantly different from the first two years in that the students spend all of their time on clinical rotations. While the students still take written examinations at the end of each rotation, the grades they receive are no

longer based upon the objective results of the written examinations but are also based in large part upon the subjective evaluations made by the professors and residents with whom the student comes in contact during the rotation. The medical student takes the courses in no particular order, varying from student to student, but is involved in only one subject at a time. Except for the course entitled Introduction to Clinical Medicine taken during the second semester of the second year, the program for third and fourth year medical students is quite different than their prior experience in medical school.

Upon beginning her third year, petitioner almost immediately ran into difficulty, receiving a marginal pass in her first rotation (orthopedic surgery). While petitioner disputes the ability of the medical school to consider the "marginal pass," arguing that the final grade is only "pass" or "fail," it is clear that the faculty, and specifically the Student Promotions Committee, is entitled to look at a student's entire academic record in determining whether the student should advance and eventually receive her degree. *See, e.g., Nichols v. McDonald,* 751 F.Supp. 811, 813 (S.D. Iowa 1990).

Petitioner later failed the obstetrics and gynecology, urology and neurology rotations. In each case, the problem was not with the written examinations in the courses, in which petitioner continued to do well. Rather, the concerns raised regarding petitioner by her professors and the residents with whom she dealt related to more subjective areas. Specifically, problems were noted of (1) loud and sometimes inappropriate remarks in the clinical setting; (2) inappropriate behavior; (3) talking and reprimanding herself out loud; (4) difficulty prioritizing

patient-clinical concerns; (5) difficulty approaching patients with difficult problems; (6) difficulty distinguishing relevant from irrelevant clinical information in synthesizing the patient's history; (7) repeatedly falling asleep; and (8) difficulty in relating verbally to peers and staff.

As a result of the foregoing concerns, Karen was brought before the Committee on Student Promotions for a complete review of her medical school performance. As a result of that review, the Committee recommended that petitioner not be registered in the College of Medicine during the spring 1988 semester. The Committee further recommended that Karen provide the Committee with a current medical evaluation for the sleep disorder, and that she continue with counseling. The Medical Council, which is the body empowered to enforce requirements for students to remain in good standing, approved the recommendation that Karen should not be registered in the spring 1988 semester, and that she provide a current medical and psychiatric evaluation. Karen did in fact then leave school for one semester, and pursuant to school policy re-commenced here [sic] M3 year in June, 1988.

During the interim, petitioner underwent counseling with Margaret Koch. Her recollection of the events surrounding counseling is that Ms. Koch advised her to dress and act more femininely in the future to avoid criticism by medical school faculty members. Petitioner testified that when she first returned to medical school she followed this advice and consequently passed the clinical obstetrics and gynecology rotation, which she had failed the first time. Karen attributes her pass the second time solely to the fact she was dressing and acting more

femininely. She further testified, however, that she was unable to continue with the "act" of being so feminine, as it was not really her personality. Karen asserts that once she reverted to less feminine behavior and dress, she began to have problems once again.

The Student Promotions Committee reviewed the academic performance of petitioner on August 23, 1988; November 9, 1988; December 22, 1988 and January 11, 1989. Following the meeting of January 11, 1989, the Committee recommended the cancellation of petitioner's registration. After some concern was raised concerning whether the petitioner had received adequate notice of the January, 1989 Committee meeting, petitioner was allowed to appear before the Committee on February 13, 1989. The Committee continued with its earlier recommendation, which was adopted by the Medical Council on February 16, 1989. This appeal then followed, winding its way through the Medical Council, the Executive Committee, the Vice-President of Academic Affairs, and ultimately to the State Board of Regents. Petitioner is now challenging the decision of the Board of Regents.

As set forth above, Karen's concerns about the counsel she believes she received from Ms. Koch to dress and act more femininely, and the consequent effects of her perceived following and then disregard of Ms. Koch's advice form a significant part of petitioner's claim of sexual discrimination. In further support of her claim, petitioner points to references in her evaluations to her being "aggressive", as well as to comments concerning petitioner's dress. There are a significant number of such comments in the evaluations.

Plaintiff cites *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) in support of her position that she has been the victim of discrimination on the basis of sex, as evidenced by the use of the descriptive term "aggressive." Specifically, petitioner argues that she has been the victim of sex stereotyping, and apparently refers to the following language in *Price Waterhouse*:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be, has acted on the basis of gender. . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of job if they don't. Title VII lifts women out of this bind. *Price Waterhouse*, 109 S.Ct. at 1790-91.

The Court assumes for purposes of its decision that the Price Waterhouse analysis applies to the University of Iowa College of Medicine, and its treatment of students, although the situation is obviously not an employer-employee situation.

The legal standard to be applied to petitioner's claims of discrimination on the basis of sex, violation of her rights to freedom of speech, and denial of equal protection is not clear. Respondent argues that the Court should apply the traditional analysis used in administrative appeal cases and simply decide whether there is substantial evidence to support petitioner's dismissal from medical school. However, petitioner urges the Court to apply traditional civil rights analysis, such as that set

forth in *Price Waterhouse,* especially since petitioner argues that she was denied the opportunity to make a full factual record below concerning her claims of sex discrimination, denial of freedom of speech, and denial of equal protection. Based upon its view of the evidence in this case, the Court concludes that it makes no difference what analysis is used in making its determination. In any event, petitioner's dismissal from medical school must be upheld.

The problem with petitioner's claims of discrimination on the basis of sex is not the legal basis for her claims, but the factual basis. While there is certainly evidence that critical comments were made concerning petitioner's dress and aggressiveness, there is *no* evidence to support the proposition that a different standard was applied to male and female students, in that aggressiveness was encouraged in male students but not in female students. From all the evidence adduced at trial, it is clear that doctors of all kinds, regardless of race, sex or other criteria, are expected to be aggressive in caring for their patients and treating their medical problems. However, they are also expected to be professional in their dealings with patients, staff and peers. It is clear to the Court that the context of comments in the evaluations concerning petitioner's aggressiveness were made in the sense of professionalism, that is that petitioner was failing to act in a manner appropriate to any and all physicians. Such a criterion is not only not improper, but is laudable and certainly a legitimate goal for the medical school faculty to seek in its graduates.

Petitioner's argument that she was dismissed from the medical school as a consequence of exercising her

rights to freedom of speech is also without factual basis. There is simply no question that petitioner's difficulties stemmed not from, for example, expressing political views or stating medical opinions contrary to her professors. Rather, as was apparent from the testimony of Dr. Healy, the problems arose because petitioner's speech and conduct was disruptive of the academic process. The Court must note that petitioner's conduct during the course of the six-day trial was further evidence in support of respondent's view of the facts underlying the present dispute. There were several instances during the proceedings, even during the testimony of other witnesses, when petitioner was loud and disruptive of the court proceedings. The point is not that the Court was offended by such conduct, or considered it contemptuous, but rather that the conduct was inappropriate for someone of petitioner's age, experience and desired profession.

Respondent correctly points out that while students enjoy the right of freedom of speech, that right is not unlimited. *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, 738 (1969). The Court concludes that in this case the College of Medicine in no way inappropriately acted against petitioner as a consequence of her exercising free speech rights. Once again, the sole purpose of the comments made and actions taken by the medical school was to matriculate a first class medical professional person, who could deal with patients, staff and peers in an appropriate manner.

Petitioner's final argument is that she was denied equal protection because she was the only person in her class who "passed" all of her M3 classes and yet was not

permitted to proceed on to the M4 year. The Court has substantial question as to whether the class petitioner alleges, namely those medical students who were to graduate in 1989 and 1990, is the appropriate class to consider; petitioner's classification appears unduly restrictive. However, the Court concludes that no denial of equal protection has occurred in any event.

It is clear from the record evidence that the Student Promotions Committee is vested with great authority and discretion in determining whether a student should advance to the next level within the medical school and ultimately to graduate. Certainly, that authority is not unlimited, as it is subject to review by the Medical Council in every instance and also to the appeal process as has occurred here. Nevertheless, the Student Promotions Committee must have such authority and discretion if the University of Iowa College of Medicine is to be an effective academic institution. *See Nichols v. McDonald*, 751 F.Supp. 811, 814-15 (S.D.Iowa 1990).

Here the Student Promotions Committee was faced with a number of concerns regarding petitioner, which were valid concerns as set forth above. These concerns existed regardless of the fact that petitioner had received a grade of "pass" in each of her M3 courses. There was and is substantial evidence to support the conclusion of the Student Promotions Committee, and the affirmation of that conclusion by the Medical Council and subsequent appeal process. The Court cannot on this record conclude that the decision made was arbitrary and capricious. Indeed, it is apparent that the Student Promotions Committee made the decision regarding petitioner only with

reluctance and after careful and considerable deliberation.

One of the first witnesses called by petitioner was Dr. Jean Jew, a professor of anatomy at the University of Iowa College of Medicine. Petitioner asked the Court to take judicial notice of the recent lawsuit which Dr. Jew successfully prosecuted against the College of Medicine. Dr. Jew was coincidentally one of the five members of the Student Promotions Committee which voted unanimously to dismiss petitioner from the College of Medicine. While the facts underlying Dr. Jew's claim of sexual harassment are arguably quite different than the claims being made by petitioner, it is obvious that if anyone would have been sensitive to sexually discriminatory criteria being applied to a female student, it would be Dr. Jew. In fact, Dr. Jew testified that she scrutinized petitioner's records and evaluations to be certain in her own mind that sex discrimination was not a factor. Dr. Jew concluded that in petitioner's case only valid academic criteria were being applied. This Court reaches the same conclusion, and considers the testimony of Dr. Jew to be particularly persuasive in support of the determination reached by the College of Medicine to dismiss petitioner.

For all of the foregoing reasons, the decision of the respondent is hereby AFFIRMED.

Dated this 11th day of April, 1994.

/s/ Robert A. Hutchinson
Robert A. Hutchinson, Judge
Fifth Judicial District of Iowa

Supreme Court, U.S.
FILED
DEC 27 1994
OFFICE OF THE CLERK

94-1169

NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

KAREN R. LUNDE,

PETITIONER

vs.

CHARLES M. HELMS, ET AL.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO "STATEMENT OF THE CASE" AT PAGES 2 THRU 4 OF RESPONDENTS' BRIEF IN OPPOSITION:

Throughout this litigation, counsel for Respondents have, on many occasions, misrepresented the record. The first of such misrepresentations that is set forth in Respondents' Brief in Opposition is in the very first paragraph of its "Statement of the Case," page 2. Here, Respondents claim, falsely, that "This case was originally brought pursuant to . . . Iowa Code chapter 17A, the Iowa Administrative Procedures Act." In fact, as Petitioner stated in her Petition for Certiorari, at page 16, her Complaint in Federal court "did not include any pendent state claims."

Another of such misrepresentations occurs at page 4 of Respondents' Brief in Opposition:

> Petitioner then returned to her Federal action, and on **December 8, 1992**, moved for the recusal of the Honorable Charles R. Wolle. **On the same date, she filed her Amended Complaint** which sought damages and **for the first time, a jury trial.** [Emphasis supplied.]

Along with this Reply to Brief in Opposition, Petitioner is filing three documents in the Office of the Clerk, U. S. Supreme Court.[1] One of these three documents, lodged with the Clerk, is an original, file-stamped copy of the Complaint (Amended) in the instant case,

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[1]The three documents filed as lodgings are: Complaint (Amended), file-stamped Aug. 15, 1989, at 12:46 p.m.; Application for an Appeal in Advance of Final Judgment, showing an Iowa Supreme Court file stamp of Nov. 30, 1990; and a copy of an Order denying the application, without prejudice, by the Iowa Supreme Court, filed Jan. 2, 1991.

clearly showing that it was filed **Aug. 15, 1989, NOT Dec. 8, 1992**, as claimed by counsel for Respondents in the passage quoted above. This difference in dates is very significant. Petitioner filed her Complaint (Amended), requesting a jury trial on damages with reference to the individual Defendants (Respondents here) on Aug. 15, 1989, PRIOR TO the date that Judge Wolle put this case on a stay, of indefinite duration, which date was Aug. 31, 1989. Petitioner further amended her Complaint, with the Court's permission, on Feb. 18, 1993.[2] Res-

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[2]Permission to amend her Complaint to reflect changes which had occurred during the period of three and one-half years while the instant case was on a stay ordered by Judge Wolle was set forth in an **Order of Jan. 26, 1993 by a U. S. Magistrate Judge**, not an order by Judge Wolle.

pondents filed their Answer to Petitioner's Second Amended Complaint on April 5, 1993. In the passage quoted above, Respondents attempt to make it appear that Petitioner did not file her request for a jury trial on damages until Dec. 8, 1992, a date subsequent to the State administrative and judicial proceedings. As noted above, Respondents thus have misrepresented the record, to this Court. This same misrepresentation was made by Respondents to the U. S. Court of Appeals for the Eighth Circuit (in Defendants-Appellees' Brief, page 11) and Petitioner brought this to the attention of the Court of Appeals (in her Reply Brief, at page 4). Nevertheless, this misrepresentation evidently confused the Court of Appeals, which said, in

pertinent part:

> . . . The district court vacated the stay, denied the motion to recuse and granted Lunde leave to file an amended complaint, **adding a Title IX damages claim and a demand for jury trial.** . . . (Emphasis supplied.)

Thus, it appears that the Court of Appeals thought that the damages claim and demand for jury trial were not added until the Complaint was amended **subsequent to** the stay. But the damages claim and jury demand were added **prior to** the stay, and this confusion may very well have been outcome-determinative. In her Petition for Rehearing and Suggestion for Rehearing En Banc filed with the Court of Appeals, Petitioner, at pages 14-15, noted the confusion by the Court as follows:

> Appellant respectfully requests rehearing, by the panel, and if possible, reargument, in order to

> completely replace the decision entered on July 6, 1994. The factual misapprehensions set forth therein are so many in number, and so fundamental in scope, that it would be wise to begin anew. . . .

Another important misrepresentation of the record by the Respondents is this one, at page 3 of their Brief:

> . . . Although the Petitioner asserted a reservation of federal claims for later litigation in federal court, she vigorously litigated all of her federal claims in the Iowa court. On February 25, 1991, through March 4, 1991, **trial was held** . . . [Emphasis supplied.]

There was no "trial" in State court. The so-called "trial" was actually an evidentiary hearing, pursuant to Chapter 17A, Iowa Administrative Procedure Act, which a State court judge conducted as a part of administrative review proceedings, in which Petitioner's participation was coerced and under vigorous protest.[3]

Quoting from Judge Wolle's Rulings and Summary Judgment for Defendants, pp. A-22 through A-50, in the Supp. Appendix to Petition for Writ of Certiorari:

> . . . the court exercised its

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[3] See, Application Pursuant to Rule 2, Iowa Rules of Appellate Procedure, for an Appeal in Advance of Final Judgment from a Decision by The Hon. Robert A. Hutchison, Judge, Fifth Judicial District of Iowa, in the Iowa District Court for Polk County, Appellant's Application, Karen R. Lunde v. State Board of Regents, in the Supreme Court of Iowa, No. 90-1785, filed Nov. 30, 1990, lodged with the Office of the Clerk, U.S. Supreme Court.

discretion

> to stay further proceedings in this court pending the outcome of administrative and State judicial proceedings concerning plaintiff's challenge to her dismissal from medical school.

In the ruling of August 31, 1989, this court made clear that it would lift the stay and hold further proceedings in this action if the plaintiff demonstrated

> that any administrative and judicial proceedings plainly infringe the constitutional rights or federal statutory rights of the plaintiff in respects that the State judiciary cannot or will not address and remedy. [Pages A-25 and A-26.]

Petitioner appealed the stay order; see, Lunde v. Helms, 898 F.2d 1343 (8th Cir. 1990), cert. denied, 498 U.S. 897, 111 S.Ct. 249 (1990). The coercion of Petitioner in the stay order is obvious.

REPLY TO "REASONS FOR DENYING THE WRIT" AT PAGES 5 THRU 10 OF RESPONDENTS' BRIEF IN OPPOSITION:

I. Respondents claim that there are no special and important reasons in this case to grant certiorari to review a judicial recusal decision. Respondents further claim that "Petitioner's issue is neither important nor recurring."

On the contrary, Petitioner would point out the very obvious fact that issues regarding judicial recusal are being raised with increasing frequency. A search of all volumes of Federal Reporter 3rd reveals that the Federal recusal statute, 28 U. S. Code Sec. 455, is mentioned at least once in almost every volume. Moreover, Fifth Amendment, or Fourteenth Amendment, due process is implicated in virtually every case,

because every party is entitled to an impartial judge, as an element of due process. See, 48A C.J.S., Sec. 108, Judges.

Thus, the recusal issues involved here are important, because they have constitutional due process implications, and they are recurring with increasing frequency. And, as illustrated by the confusion among the circuits as to the appropriate standard of review, the instant case will give the Supreme Court a timely opportunity to give guidance to the Courts of Appeal in this increasingly important area: Judicial recusal, and the appropriate standards to be used by the Courts of Appeal in reviewing district court recusal rulings.

II. Respondents claim that the standard of review used by the Court of Appeals in deciding the recusal issue was not determinative of the Court's decision. Petitioner, on the other hand, contends that the standard of review may very well have been outcome-determinative.

Under the obsolete "abuse of discretion" standard used by the Court of Appeals for the Eighth Circuit in the instant case, it is assumed that the Judge has almost complete discretion as to whether or not to recuse himself. This may have been a proper standard prior to "the major changes in prior law effected by the revision of [28 U.S. Code] Sec. 455 in 1974." See, Liteky v. U. S., ___U.S. ____, 114 S.Ct. 1147, 1153, 127 L.Ed.2d

474 (1994), opinion for the Court by Justice Scalia. However, the 1974 changes warrant use of a de novo standard of review. In Liteky, supra, Justice Scalia wrote, in pertinent part:

> Subsection (a), the provision at issue here, was an entirely new "catch-all" recusal provision covering both "interest or relationship" and "bias or prejudice" grounds, see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)--but requiring them all to be evaluated on an objective basis, so that what matters is not reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever "impartiality might reason-

ably be questioned." [114 S.Ct. 1147, 1153-1154.]

The Liteky opinions reveal a 5-4 split among the Justices of this Court as to whether or not an "extrajudicial" source of bias or prejudice must be shown, with reference to Sec. 455(a). The Court of Appeals did not discuss this point but might have done so, had it been using a de novo standard of review. See, e.g., Matter of Huntington Commons Associates, 21 F.3d 157 (7th Cir. 1994), where the Seventh Circuit applied the Liteky decision that had only been announced the previous month, and obviously did not review for abuse of discretion. Thus, one of the differences that de novo review can make in outcome is that the Court of Appeals can freely apply the

latest Supreme Court decisions in this developing area of the law.

Here, with reference to the instant case, is what the Court of Appeals for the Eighth Circuit **should** have done, in the light of Liteky:

1) The fact that Judge Wolle had been making financial contributions to the Respondents provided the **extrajudicial source** for his bias in favor of Respondents;

2) Some of the **rulings** that Judge Wolle made, evidencing his bias in favor of the Respondents, may be summarized as follows:

a) Petitioner contends that the stay of her Federal case for three and one-half years indicated bias in favor of Respondents. The decision by the Court of Appeals in

Lunde v. Helms, 898 F.2d 1343 (8th Cir. 1990), cert. denied, 498 U. S. 897, 111 S.Ct. 249 (1990) assumed that the stay was only a "temporary suspension" of Petitioner's Federal case.

b) The fact that Judge Wolle would not allow Petitioner to proceed with her Federal court suit until she had totally exhausted all of her State administrative remedies amounted to bias in favor of Respondents, because the U. S. Supreme Court had held that exhaustion of State remedies is not a prerequisite for a 42 U. S. Code Sec. 1983 suit in Federal Court. Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

c) Judge Wolle's ruling that

Petitioner was precluded from any sort of trial failed to consider the right to a jury trial as guaranteed by the Seventh Amendment, U. S. Constitution; he also failed to take into account Rule 38(a), Federal Rules of Civil Procedure.

d) In his ruling, Judge Wolle obviously ignored the central thrust of the Supreme Court's decision in Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990). The Court of Appeals should have compared what Judge Wolle said about the Lytle case, see Supp. Appendix to Petition for Writ of Certiorari, page A-47, with what the Supreme Court said:

> . . . concern about judicial economy . . . remains an insufficient basis for departing from our longstand-

ing commitment to preserving a litigant's right to a jury trial. [Opinion by Justice Marshall for a unanimous Court.]

e) Judge Wolle ignored the Petitioner's reservation of her Federal suit for the Federal forum, pursuant to England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); he made no mention of this case, nor of its impact on the instant case, despite it being cited many times by Petitioner.

f) Judge Wolle also indicated in his ruling that he had prejudged the merits of Petitioner's jury case. Judge Wolle characterized Petitioner's First Amendment claims as "frivolous" [A-37] and "spurious" [A-39]. Conclu-

ding, he revealed his belief that university officials should make academic and retention decisions, thus implying a belief that the court should not interfere. [A-49, A-50.]

The foregoing views expressed by Judge Wolle respecting the merits of Petitioner's case "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." See, Liteky v. U.S., 114 S.Ct. 1147, 1157 (1994), opinion for the Court by Justice Scalia.

Clearly, there was ample justification for Petitioner's recusal motion. Petitioner urges that the standard of review used by the Court of Appeals may have been outcome-determinative. This Court is amply justified in granting certiorari to resolve the conflict.

III. Respondents claim that Petitioner "unreservedly" litigated her Federal claims in State Court, and that the decision to "deny her request to start over again with a jury trial was correct." In making this claim, Respondents are misrepresenting the record.

Contrary to Respondents' claim, Petitioner did nothing to forego her right to return to the Federal court. Petitioner did only what the Federal court, in its stay order of August 31, 1989, required as a prerequisite for returning to Federal court.

Respondents contend that Petitioner "attempted" to reserve her rights to return to the Federal court, pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) but then "vig-

orously" asserted her Federal claims in the State administrative and judicial review proceedings.

The Supreme Court, in the England case, said:

> When the reservation has been made . . . his [the litigant's] right to return will **in all events** be preserved. [375 U.S. 411, 421-422, 84 S.Ct. 461, 468 (1964), emphasis supplied.]

Since Petitioner in fact reserved her right to return to the Federal court, she did all she needed to do in order to preserve her right to return. Judge Wolle's summary judgment ruling should have been reversed.[4]

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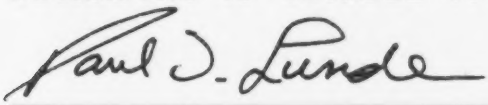
[4]Petitioner cited the England case on five different pages of her Brief to the Court of Appeals and on four different pages of her Reply Brief. The Court of Appeals made no mention of England.

SIGNATURE OF COUNSEL OF RECORD:



Paul D. Lunde, Attorney for Petitioner,

a member of the Bar of this Court.